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IN THE
Supreme Court of the United States
OCTOBER TERM 2001

RICHARD L. MATHIAS, ET AL.,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, ET AL.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, KENTUCKY PUBLIC SERVICE COMMISSION, LOUISIANA PUBLIC SERVICE COMMISSION, NEW YORK PUBLIC SERVICE COMMISSION, MISSOURI PUBLIC SERVICE COMMISSION, AND PUBLIC UTILITIES COMMISSION OF NEVADA SUPPORTING PETITIONER

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QUESTIONS PRESENTED[1]

1. Whether a State commission's action relating to the enforcement of a previously approved § 252 interconnection agreement is a "determination under [§ 252]" and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6)?

2. Whether a State commission's enforcement of interconnection agreements for the provision of local telephone service under § 252 of the Telecommunications Act, which provides that State determinations are reviewable in federal court, constitutes a waiver of 11th Amendment immunity?

3. Whether an action seeking prospective relief against State public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine?

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[1] The issues were specified by this Court when granting certiorari at *Mathias v. WorldCom Technologies, Inc.*, 121 S.Ct. 1224 (Mem), 149 L.Ed.2d 135, 69 USLW 3399, 69 USLW 3585, 69 USLW 3592 U.S. (March 05, 2001).

LIST OF PARTIES BELOW

Pursuant to U.S. Sup.Ct. Rule 29.6, 28 U.S.C.A., NARUC states as follows: NARUC is supported predominantly by dues paid by its State public utility commission members and through revenues generated by three meetings each year of those members. NARUC has no parent company, subsidiary, or affiliate.

The Parties to the proceeding before the 7th Circuit follow: (1) Illinois Bell Telephone Company d/b/a Ameritech Illinois, (2) Worldcom Technologies, Inc., (3) Teleport Communications Group, Inc., (4) Illinois Commerce Commission, and (5) Focal Communications. NARUC and others filed as *amici*.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES AND AFFILIATES ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

Exceptions To State Immunity To Private Nonconsensual Suits In Federal Court Must Be Strictly Construed And Have no Application To the Circumstances Presented.

A. Applicable Statutory Construction Rules Require 47 U.S.C. § 252 Be Read To Exclude Federal Court Review Of State Enforcement Decisions 10

B. States Do Not Waive Their Sovereign Immunity By Either Engaging in Enforcement Activity or Making "Determinations" Within the Meaning of § 252 17

C. Individual Commissioners of NARUC'S Member State Utility Commissions Are Not Subject To Injunctions Under Ex parte Young 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASE **PAGE**

Alden v. Maine, 527 U.S. 706 (1999)....3, 7 n.4, 9 n.11, 17 n. 23

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)....8 n.5, 7 & 8, 9 n.9

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)....3, 6, 8 n.8, 18, 20, 20 n. 27

Edelman v. Jordan, 415 U.S. 651, 673 (1974)....8 n.8, 8 n. 11, 17 n. 23

Ex parte Young, 209 U.S. 123(1908)....*passim*

FERC v. Mississippi, 456 U.S. 742 (1982)....19 n.24

FTC v. Mandel Brothers, Inc., 359 U.S. 385 (1959)....13 n. 16

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)....8 n. 7

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999)....3, 17 n. 23

Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944)....8 n. 7

Green v. Mansour, 474 U.S. 64 (1985)....9 n. 11

Hans v. Louisiana, 134 U.S. 1(1890)....7 n. 4

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028 (1997)....6, 7 n. 4, 22, 24, 24 n. 25, 29

Illinois Bell Telephone Co. v. Worldcom Technologies, Inc., 179 F.3d 566 (7th Cir.(Ill.) Jun 18, 1999), as amended (Aug 19, 1999), rehearing and rehearing en banc denied (Aug 09, 2000) certiorari granted in part, *Mathias v. WorldCom Technologies, Inc.*, 121 S.Ct. 1224, 149 L.Ed.2d 135 (Mar 05, 2001) (NO. 00-878)....*passim*

Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982)....2 n. 2

Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, 519 U.S. 248 (1997)....11 n. 12

Jones v. United States, 529 U.S. 848 (2000)....16

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994)....12 n. 15

Munn v. People of State of Illinois, 94 U.S. 113, 124 (1876)....13 n. 19

New York v. United States, 505 U.S. 142(1992)...18, 19 n. 24

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).....9 n. 10

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946).....13 n. 18

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).....6, 7 n.4, 8 n. 6, 9 n.11, 17, 17 n. 22, 22

Smith v. Reeves, 178 U.S. 436 (1900).....8 n. 7

Southwestern Bell Tel. Co. v. Public Util. Comm'n, 208 F.3d 475, 481 (5th Cir.2000).....11 n. 13

Stone v. Immigration and Naturalization Service, 514 U.S. 386 (1995).....12 n. 15

United States v. Ron Pair Enterprises, 489 U.S. 235 (1989).....11 n. 12

United States v. Southern Motor Carrier Rate Conference, et al., 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 F (1985).....2 n. 2

Washington Utilities and Transportation Commission v. FCC 513 F.2d 1142 (9th Cir. 1976).....2 n. 2

CONSTITUTIONAL PROVISIONS

U. S. CONST. amend. XI.....*passim*

STATUTES

Communications Act of 1934, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 *et seq.*, Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("1996 Act" or "Act").....*passim*

Pub.L.No. 104-104, §601(c)(1), 110 Stat. 56, 143 (codified in note following 47 U.S.C. § 152 (1996)).....4, 5, 10, 11 n. 13, 12, 15

47 U.S.C. § 410(c).....2 n. 2
47 U.S.C. §261(b) & (c).....16 n. 20
47 U.S.C. § 254.....2 n. 2
47 U.S.C. §253 (d).....16 n. 20
47 U.S.C. § 252(b)(1).....22
47 U.S.C. § 252(b)(3).....22
47 U.S.C. § 252(b)(4).....22
47 U.S.C. § 252(e)(4).....22, 25 n. 30
47 U.S.C. §252(e)(3).....16 n. 20
47 U.S.C. § 252(e)(6)..... 4, 5, 9, 10, 11, 11 n. 14, 17, 23
47 U.S.C. § 252.....*passim*
47 U.S.C. § 251.....4, 6
47 U.S.C. § 152.....12, 16 n. 20

Indian Gaming Regulatory Act, 25 U.S.C. § 2702 et seq. (1988).....6, 22

25 U.S.C. § 2710(d)(7)(B)..... 22

SUPREME COURT RULES

U.S. Sup. Ct. Rule 29.6, 28 U.S.C.A.,.....ii

U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A.,.....1

U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A.,.....1

MISCELLANEOUS

47 C.F.R. 51.807(b).....19 n. 24

Section 350.01(5), Fla. Stat.....22 n. 29

Nowak, John E., Rotunda, Ronald D. & Young, J. Nelson, *Constitutional Law*, West Publishing St. Paul, MI (1980).....13 n. 19

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the telecommunications

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[1] In accordance with U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., all parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. In addition, pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC states the following: (1) NARUC's General Counsel authored this brief with the assistance of NARUC's member commissions, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC made a financial contribution to the preparation or submission of this brief.

common carriers within their respective borders. Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.[2]

The *Kentucky Public Service Commission, Louisiana Public Service Commission, New York Public Service Commission, Missouri Public Service Commission, and Nevada Public Utilities Commission* felt so strongly about the issues presented for review that they not only assisted in the drafting of this joint brief, but also co-signed as *amici*. NARUC's member commissions, including the five listed *supra* separately joining this brief, regulate intrastate telecommunications services and particularly the local service supplied by incumbent local exchange carriers ("ILECs), like Illinois Bell Telephone Company, in the territories these ILECs serve. These commissions are obligated to ensure local telephone service supplied by the ILECs is provided at just and reasonable rates. They have a further interest to encourage the ILECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory

2 See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. See also 47 U.S.C. § 254 (1996). See also *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

provisions[3] specifying ILEC obligations to interconnect and provide nondiscriminatory access to competitors. See 47 U.S.C. § 252 (1996).

Historically, State Commissions have always had oversight and enforcement responsibilities, pursuant to their individual State enabling statutes, of carrier-to-carrier interconnection agreements similar to the ones that gave rise to this appeal. The three specific issues designated for review will unequivocally impact NARUC member commission actions in future interconnection enforcement cases. Moreover, the 7th Circuit's expansive application of the *Ex parte Young* doctrine and interpretation of this Court's decisions in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (*College Savings*), *Alden v. Maine*, 527 U.S. 706 (1999) (*Alden*), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) carry the threat of inappropriately subjecting State commission activities across other regulated industry sectors to private party suits in federal courts. Because of that impact, NARUC's *counsel has been specifically instructed by all of its members to support the Illinois commission in this litigation.*

State commissions have an obvious interest in protecting their scarce resources, sovereignty, and the integrity of their procedures from non-consensual private-party suits in federal court in violation of the 11th

3 *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 *et seq.*, Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("1996 Act" or "Act").

Amendment. To protect these interests, NARUC and the Kentucky, Louisiana, Missouri, New York and Nevada commissions, continue to oppose all unwarranted expansions of the narrow exemptions to the 11th amendment like those in the 7th Circuit decision presented for review.

SUMMARY OF ARGUMENT

Because State sovereign immunity to private nonconsensual suits in federal courts is a vital principle of our federal constitutional structure, this Court has strictly construed the three permissible exceptions: (1) express Congressional abrogation, (2) State voluntary or constructive waiver, or (3) application of the *Ex parte Young* doctrine. Congressional abrogation cannot be seriously considered, so the focus must turn to whether States' have waived their immunity or if the *Ex parte Young* doctrine is applicable.

Any analysis must begin with the text of § 252. Basic tenets of statutory construction, the express terms of the 1996 Act itself in § 601, and Supreme Court jurisprudence require a narrow reading of § 252. *The "plain language" of § 252(e)(6) does not expressly confer jurisdiction on federal courts to review State orders enforcing interconnection agreements.* The section purports to confer jurisdiction only to review State "determinations" made under § 252 to determine if the agreements "meet[] the requirements of [§§ 251 and 252]." This Court has always insisted that statutes conferring jurisdiction on federal courts be strictly construed. Moreover, Congress provided specific instructions on how to construe § 252 in § 601(c) which specifies that section "shall not be construed to modify, impair, or supercede . . .State . . . law unless expressly so provided." A strict construction of § 252 is particularly

appropriate because *federal statutes cannot confer additional authority on any State agency.* Instead, Congress either: (1) lifts federal statutory restraints on *existing* State authority, or (2) preempts *existing* State authority to act. *Clearly, § 252 must therefore be viewed as an incursion on existing State authority rather than as a grant of "new" authority.* If the proscription against "implying" preemption does not apply, to discern Congress' view of the scope of review authority, this Court must engage in one of two possible illogical exercises. Both require the Court to "imply" a Congressional "grant" of authority where the States already inherently possess it. Neither exercise accords with Congress' expressed intent – as evidenced by both the plain text and § 601(c)'s proscription. Finally, adopting the plain-language reading of §252(e)(6) advanced *supra* clearly allows the Court to follow its general rule to avoid considering grave constitutional issues where possible. The text and applicable rules of construction demonstrate that State enforcement actions cannot be construed as a "determination under [§ 252]" and thus are not reviewable in federal courts. Moreover, even if such decisions are considered, *arguendo*, to be subject to §252(e)(6), that section's applicability is far from explicit, and the States cannot be understood to have voluntarily subjected themselves to its provisions.

Since there is no evidence, or even allegation, that the Illinois Commission expressly waived its immunity by statute or constitutional provision, ultimately, the second issue presented for review must turn on the issue of constructive waiver. Because the 1996 Act (1) impacts a core State regulatory function involving an exercise of police power, (2) does not present States with a viable choice, and

(3) provides no "gift" or benefit, it presents a far stronger case for State immunity than that presented to this Court in the recent landmark *College Savings* decision where the issue was whether the State would be given immunity for actions removed from core State functions. There is no "gift", no implied waiver, no Congressional abrogation, and no express State waiver. Therefore, for the Illinois Commission's enforcement orders to be subject to federal court review, it must fall within the *Ex parte Young* exemption. A close examination of the relevant case law and the text of the Act shows it does not.

Like the statute at issue in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Telecommunications Act provides detailed provisions for compulsory arbitration of interconnection agreements. Also, the 1996 Act contains no evidence Congress intended to subject individual State officials to federal suits. According to this Court, where a statutory scheme unmistakably "permits" a State or its agency to act, as opposed to an individual State official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Seminole*, 517 U.S. at 75 n.17. In the 1996 Act, all of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and none of the provisions refer to individual State commissioners. If the logic of *Seminole* prevails, such references eliminate *Ex parte Young* as a vehicle to circumvent the 11th amendment in this case.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) (*Coeur d'Alene)*, provides a final rationale for this Court to reject application of *Ex parte Young*. As in *Couer d'Alene*, NARUC's member States have a special

sovereignty interest in ensuring their public rights of way are used by utilities to provide safe, reliable and reasonably priced local telephone service. Just as Idaho had a sovereign interest in preserving public access to its navigable waters that prevented a suit against Idaho officials under *Ex parte Young*, so too do the States have a special interest in requiring telephone companies to open access to their networks in public rights of way to competitors to ensure the public's interest in receiving the best possible telephone service at the lowest price. The Court should find Illinois' sovereign immunity remains intact - having been neither abrogated nor waived, nor bypassed pursuant to *Ex parte Young* - and vacate the decision below.

ARGUMENT

THE LIMITED EXCEPTIONS TO STATE IMMUNITY TO PRIVATE NONCONSENSUAL SUITS IN FEDERAL COURT MUST BE STRICTLY CONSTRUED AND HAVE NO APPLICATION TO THE CIRCUMSTANCES PRESENTED IN THIS PROCEEDING.

State sovereign immunity to private nonconsensual suits in federal courts is an inherent feature and vital preexisting principle of our federal constitutional structure.[4]

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[4] *Alden*, 527 U.S. at 712-13, 715 (1999); See also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (*Seminole*); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)(*Han*) and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997)(*Coeur d'Alene*). This principle "accords the States the respect owed them as members of the federation," *Alden*, 527 U.S. at 748-49, and avoids the indignity of States being

footnote continued on next page

In recognition of that structure, this Court has always strictly construed limitations on that immunity[5] finding only three general circumstances where such suits are permissible. First, Congress can abrogate the sovereign immunity of nonconsenting States if (1) it validly acts "pursuant to a constitutional provision granting Congress the power to abrogate," and (2) it "unequivocally express[es] its intent to abrogate the immunity."[6]

Second, a State may voluntarily waive its sovereign immunity from suit by private individuals in federal courts either by explicitly consenting to such suits,[7] or by accepting from Congress a gratuity that is conditioned on such a waiver.[8] However, the State must directly and affirmatively

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subjected to the "coercive process of judicial tribunals at the instance of private parties," *Seminole*, 517 U.S. at 58.

5 See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (*Atascadero*) ("The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.")

6 Since § 5 of the 14th Amendment was designed to "expand[ ] federal power at the expense of State autonomy," the Court has said it grants Congress a power of abrogation that "intrude[s] upon . . .the 11th Amendment." *Seminole*, 517 U.S. at 55, 59. See also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). The 1996 Telecommunications Act was based on the Commerce clause authority.

7 See *Atascadero*, 473 U.S. at 241; *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944); and *Smith v. Reeves*, 178 U.S. 436, 441 (1900).

8 See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686-8 (1999) (*College Savings*); *Atascadero*, 473 U.S. at 247. But "[t]he test for determining whether a State has waived its immunity. . .is a stringent one." See also *College Savings*, *Id.* at 675; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (*Edelman*).

waive its immunity in a State constitutional provision or statute that explicitly "specif[ies] the State's intention to subject itself to suit."[9] Similarly, a "gratuity" from Congress, by itself, will effect a waiver of immunity by a recipient State only if Congress "manifest[s] a clear intent" to condition the gift on the State's waiver of its immunity.[10]

Finally, to ensure the supremacy of federal law, a State's 11th Amendment sovereign immunity rights are lifted in certain cases pursuant to the *Ex parte Young* doctrine to allow federal jurisdiction over suits that seek prospective injunctive relief against a State officer alleged to be perpetrating an ongoing violation of federal law.[11]

This Court's order granting certiorari set for review three issues: (1) Is enforcement of an interconnection agreement a "determination" under 47 U.S.C. § 252 and thus reviewable in federal court under 47 U.S.C. § 252(e)(6)? (2) Does a State's participation in a federal scheme that provides that State determinations are reviewable in federal court constitute a waiver of immunity? and (3) does the *Ex parte Young* doctrine apply to negate State immunity? As discussed *infra*, the 7th Circuit decision's examination of these issues does not "indulge every reasonable presumption against" a State waiver of immunity. Instead, the opinion

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9 See *Atascadero*, 473 U.S. at 241.

10 Id. at 247; See also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

11 See *Ex parte Young*, 209 U.S. 123 (1908); See also *Alden*, 527 U.S. at 747; *Seminole*, 517 U.S. at 73-74; *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Edelman*, 415 U.S. at 663-68.

relies on a series of presumptions in favor of waiver, leading inevitably to its conclusion that all three questions should be answered in the affirmative. Under the 7th Circuit's analysis, by engaging in *any* consideration of conduct under an approved agreement or statement, no matter how limited or unrelated to the prior approval, State commissions waive immunity and subject themselves or their commissioners to suit in federal court. As discussed *infra*, NARUC respectfully submits that such a result is contrary to the express language of the Act and this Court's prevailing precedent and must be reversed.

A. APPLICABLE STATUTORY CONSTRUCTION RULES REQUIRE 47 U.S.C. § 252 BE READ TO EXCLUDE FEDERAL COURT REVIEW OF STATE ENFORCEMENT DECISIONS.

The 7th Circuit finds that State orders to enforce an interconnection agreement "determination" under § 252 are themselves "determinations" and thus reviewable in federal court under § 252(e)(6). This interesting construct not only ignores the basic tenets of statutory construction, but also the express terms of the statute itself in §601, and this Court's thematic insistence that Congressional enactments that successfully negate a participating State's 11th Amendment immunity, "manifest a clear intent" to condition the gift or gratuity on the State's waiver.

This Court's basic "plain language" rule of statutory construction applies here: Where the language of the statute is plain, it is regarded as conclusive, and any inquiry as to its

meaning should ordinarily end.[12] Neither the 7th Circuit, nor the other decisions cited by the 7th Circuit address this rule. All essentially acknowledge, as they must, that the plain language of § 252(e)(6) does not expressly confer jurisdiction on federal courts to review State commission orders enforcing negotiated interconnection agreements.[13] By its own terms, that section only confers[14] jurisdiction on federal courts to review State commission "determinations" made under § 252 "to determine whether [interconnection] agreement[s] ... meet[] the requirements of section 251 and this section [252]." {Emphasis Added}

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12 *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248, 261 (1997); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989).

13 *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 481 (5th Cir.2000) was one of the cases cited below that expressly recognizes § 252(e)(6) can be read literally to only limit federal review of State decisions "approving or disapproving, or arbitrating, an interconnection agreement." *Id.* at 479. But it decides that "plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to. . .enforce [such] agreements." *Id.* Thus, it concludes, an enforcement action is an implied State power under § 252 and a determination reviewable in federal court. As discussed, *infra*, that finding (1) ignores the fact that the State already possesses authority to act unless preempted and (2) conflicts with Congressional instructions in § 601(c)(1) of the 1996 Act as well as the general principle that federal court jurisdiction must be found in an explicit Congressional grant.

14 NARUC's members believe strongly that *even where States are acting in a manner directed by the plain language of this section*, i.e., approving arbitrations or agreements under § 252(e)(6), that provision does not meet the standards established by this Court for a State's waiver of 11th amendment immunity or, as discussed below, create a circumstance permitting the application of the *Ex parte Young* doctrine.

Any further analysis of the statutory text to discover what "determinations" are made pursuant to § 252 are subject to two additional tenets of statutory construction: First, this Court's consistent insistence that statutes conferring jurisdiction on federal courts are to be strictly construed;[15] Second, Congress' contemporaneously enacted rule of statutory construction for § 252 and all other changes imposed by the 1996 Act found in § 601(c), titled "No implied effect", which specifies that: "This Act and the amendments of the Act shall not be construed to modify, impair, or supercede Federal, State or Local law unless expressly so provided in such Act or Amendments." See Pub.L.No. 104-104, §601(c)(1), 110 Stat. 56, 143 (codified in note following 47 U.S.C. § 152 (1996)).

A close look at § 252 suggests that the caption of the section, which states only that it covers "Procedures for negotiation, arbitration, and approval of agreements," is true

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15 See generally, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, at 377 (1994)

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, [citations omitted] which is not to be expanded by judicial decree, [citations omitted]. It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11, 1 L.Ed. 718 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction. ."

See also *Stone v. Immigration and Naturalization Service*, 514 U.S. 386, 377 (1995) ("Judicial review provisions . . . are jurisdictional in nature and must be construed with strict fidelity to their terms.")

to the text.[16] The only State "determinations" authorized deal specifically with arbitration and approval of arbitrated agreements. State enforcement authority is not mentioned.[17]

Critical to an understanding of a proper statutory analysis is an understanding of both the source of State authority and the interplay of that authority with Federal enactments. The application of canons of strict construction is particularly appropriate in the circumstances presented in this proceeding because *federal statutes cannot confer additional authority on any State agency.*[18] The State already has *sui generis* authority.[19]

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16 See *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959). (Titles cannot limit the plain meaning but can help resolve ambiguity.)

17 For *negotiated* agreements, the *only* "determination" that can be made by the State commission under § 252 is to approve or reject it.

18 Cf. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) (allowing States to place discriminatory taxes on out-of-state corporations in interstate commerce.)

19 See generally *Munn v. People of State of Illinois*, 94 U.S. 113, 124 (1876)

> "[The founding fathers] retained for the purposes of government all the powers of the British Parliament, and through their State constitutions . . . undertook to give practical effect to such . . .Subsequently . . . a part of the powers of the States . . .was granted to the [federal government]." {Emphasis Added}

See also Nowak, John E., Rotunda, Ronald D. & Young, J. Nelson, *Constitutional Law*, West Publishing St. Paul, MI (1980) at 112

> " For the purposes of federal law, State governments (or their subsidiaries) are not creatures of limited powers: they are recognized as having a general "police power"–the inherent power to protect the health, safety, welfare or morals of persons within their jurisdiction. .

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The majority of Congressional enactments either: (1) lift federal statutory restraints on *existing* State authority, or (2) preempt *existing* State authority to act. When Congress acts to restrict State authority, frequently, it will also include a provision to "reserve" certain levels of *existing* State authority.

In the 1996 Telecommunications Act, Congress raised previously imposed limits on State authority in some minor respects – and significantly limited existing authority in others. The section at the focus of this appeal, i.e., § 252 falls in the second category. That section reserves State commissions' traditional oversight of local telecommunications services with respect to the review and approval of interconnection agreements, if the State commission adheres to the Act's procedural restrictions and related FCC rules.

The touchstone for all statutory interpretation is Congressional intent. *Clearly, Section 252 must therefore be viewed as an incursion on existing State authority rather than as a grant of "new" authority.*

. [f]ederal courts test only whether a State act violates some specific check . . .contained in the federal constitution. {Emphasis Added}

Id. at 119 "[T]he federal government is one of enumerated powers and ... does not possess a general police power." A commission's authorization can take the form of State constitutional provisions or a separate State enabling statute.

This view explains the § 601(c) proscription against implying preemption in § 252, and also, why this Court has historically strictly construed federal court jurisdictional grants. If the proscriptions do not apply, to discern Congress' view of its review authority, the Courts must engage in one of two possible illogical exercises. They must try to guess the scope of "additional" authority "implied" by a Congressional statute (§ 252) that *unequivocally restricts more expansive existing State authority.* The alternative, though facially more appealing, has the same internal illogic. If we assume, *arguendo,* elements of § 252 actually reduce previous restrictions limiting State authority and free the State to exercise more jurisdiction than under previous enactments, *because § 252 also unmistakably severely restricts existing State authority*, the Courts still face an imprecise and arguably even more complex task of trying to discern what is the proper scope of "additional" authority that may be "implied" and thus subject to review. Neither exercise accords with Congress' expressed intent – as suggested by both the plain text of the Act and § 601(c).

State authority to generally handle enforcement matters predates the 1996 Act. There is no need to "imply" as the 7th Circuit's analysis does, its existence. State authority to enforce interconnection agreements does not derive from the mandatory statutory (and FCC authorized) restrictions imposed on States in § 252 that wish to approve or reject interconnection agreements. Rather, States' broader policy decisions and enforcement actions, such as the one at issue, are not dependent on the existence of the regulatory scheme in the Act at all, *but derive independently from the*

State's sui generis police powers[20] - separate from any role contemplated by the 1996 Act.

One other long time Supreme Court doctrine has application here:"[W]here a statute is susceptible of two constructions, by one of which grave . . .constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) {Emphasis Added}. In conformance with this doctrine, this Court should adopt the plain-language reading of §252(e)(6) advanced *supra* as it clearly allows the Court to avoid considering the significant 11th Amendment concerns posed by the other issues set for review in this proceeding.

Given the foregoing, State enforcement actions addressing a previously approved interconnection agreement cannot be construed as a "determination under [§ 252]" and thus are not reviewable in federal courts.[21] Moreover, even if this Court were to consider these decisions to be subject to

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20 In 1996, Congress expressly maintained the broad reservation of existing State authority in 47 U.S.C. § 152 over intrastate communications service, subject to numerous specific delegations of authority to the FCC. See also 47 U.S.C. §261(b),(c) [State commissions may enforce earlier regulations and continue to prescribe regulations which are not inconsistent with the Act]; §253 (d) [Act does not "effect" State's ability to impose competitively neutral universal service requirements]; §252(e)(3). 47 U.S.C. § 251(d)(3) (1996).

21 This is true even if one stretches the Act and this Court's precedent to assume, *arguendo* that the State commission's approval of the underlying arbitration agreement results in a constructive waiver of 11th amendment immunity.

§ 252(e)(6), that section's applicability is far from explicit, and the States cannot be understood to have voluntarily subjected themselves to its provisions.

B. States Do Not Waive Their Sovereign Immunity By Either Engaging in Enforcement Activity or Making "Determinations" Within the Meaning of § 252.

Ultimately, the second issue presented for review must turn on the issue of constructive waiver. In *Seminole Tribe of Florida v. Florida*,[22] this Court decided that Congress could not use the *Indian Gaming Regulatory Act*, enacted under the Indian Commerce Clause of the Constitution, to abrogate State immunity to private suits in federal court under the 11th Amendment. Since *Seminole*, this Court has made it clear that statutes enacted under the Commerce Clause to regulate interstate commerce, *including the Telecommunications Act of 1996,* cannot abrogate the States' 11th Amendment immunity to unconsented suits in either federal or State court.[23] Since there is no evidence, or even allegation, that the Illinois Commission expressly waived its immunity by statute or constitutional provision,

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22 See, *Seminole*, 517 U.S. at 72-73; U.S. Const., art. I, § 8, cl. 3; 25 U.S.C. § 2710(d)(7)(B).

23 See *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 635-636 (1999) (Patent and Plant Variety Protection Remedy Clarification Act enacted under Commerce and Patent Clauses did not abrogate State immunity); *Alden*, 527 U.S. 706 (1999) (Fair Labor Standards Act enacted under the Commerce Clause did not abrogate State immunity).

all arguments of waiver must focus on the constructive wavier doctrine.

However, any argument that States constructively waive their 11th Amendment immunity by merely arbitrating interconnection agreements under the Act or enforcing agreements tangentially related to the Act, is squarely contradicted by this Court's recent decision in *College Savings*, 527 U.S. 627 (1999).

In that case, the Court rejected claims that Florida may be subject to federal suit under the Lanham Act for trademark violations, holding the State had not "impliedly" or "constructively" waived its immunity from suit by its involvement in an enterprise for profit. The Supreme Court held that States must expressly waive their immunity and that "...there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *College Savings*, 527 U.S. at 680-681. Likewise, the State presence in the field of telephone regulation does not constitute a waiver. Moreover, §§ 251-2 procedures present State commissions with the untenable "choice" of either carrying out its statutory duties by regulating intrastate telephone services in accordance with federal and State directives, or opting out of regulating an area its State legislature has assigned it to regulate, in order to preserve its 11th Amendment immunity from suit. Such an option is no choice at all. See *New York v. United States*, 505 U.S. 142, 146 (1992) (offering "States a 'choice' between . . .two unconstitutionally coercive alternatives . . . lies

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outside Congress' enumerated powers").[24] As the Supreme Court stated:

> There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress' expressing unequivocally its intention that if

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[24] If Section 252 of the Act passes muster under the 11th Amendment, it fails under the 10th Amendment and the Guarantee Clause because of the coerciveness of the choice. Justice O'Connor, who dissented strenuously in *FERC v. Mississippi*, 456 U.S. 742 (1982) from the idea that States could be compelled "either to function as bureaucratic puppets of the Federal Government or to abandon regulation of an entire field traditionally reserved to State authority," *Id.* at 783, wrote the majority opinion in *New York v. United States*. The regulatory surrender in this case is much more onerous than that in *FERC v. Mississippi*, because that case involved State regulation of wholesale sales by competing generators, an area previously reserved to the federal government. In this case the State Commissions are coerced into surrendering their historic regulation of intrastate local telephone service to avoid unconsented federal suits by private parties. Regulation of local exchange carriers has traditionally been left within the States' police powers. Indeed, telecommunications indisputably involves a quintessential "State interest" – the provision of communication services to the citizenry at competitive rates. A State's natural imperative to continue in a *parens patria* role with respect to its citizens should not be conditioned on a waiver of vital rights. Moreover, the FCC severely undermined any voluntary aspect of the choice by stating explicitly, if they had to act because a State Commission chose not to under the Act, they would "not be bound by State laws and standards that would have applied to the State commission in such proceeding or matter." 47 C.F.R. 51.807(b). If a State Commission fails to adhere to the Act's procedural restrictions, and the FCC takes over the traditional State role, State law requirements will not receive any consideration and parties could ignore those State provisions with impunity.

> the States take certain action, it would be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that the State made an 'altogether voluntary' decision to waive its immunity. *College Savings*, 527 U.S. at 680-681.

The Hobson's choice[25] of forgoing State action in an area of traditional State regulation and waiving immunity to suit by private parties in federal court violates the sovereignty of NARUC's member State utility commissions.[26] Indeed, this is a far stronger case for State immunity than *College Savings*, where the issue was whether the State would be given immunity for actions removed from core State functions inasmuch as the State was acting as a "market participant." 527 U.S. at 681-683. In this case, the States are engaged in a core regulatory function involving an exercise of police power.[27] As the foregoing discussion

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25 Thomas Hobson was a sixteenth century English keeper of a livery stable who allowed his customers to choose the horse nearest the stable door or none at all.

26 Many State utility commissions worked effectively for years before the 1996 Act to bring the benefits of local telephone competition to their citizens without the apprehension of such suits.

27 As the Supreme Court stated in *College Savings*, "...we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed - and the voluntariness of the waiver destroyed - when what is attached to the

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clearly indicates, there is no "gift", no implied waiver, no Congressional abrogation, and no express State waiver. Therefore, for the Illinois Commission's enforcement orders to be subject to federal court review, it must fall within the *Ex parte Young* exemption. A close examination of the relevant case law shows it does not.

C. Individual Commissioners Of NARUC's Member State Utility Commissions Are Not Subject To Injunctions Under *Ex parte Young*.

Finally, NARUC's individual Commissioners are not susceptible to the third exception to immunity - injunctions for alleged violations of the Telecommunications Act under the doctrine first enunciated in *Ex parte Young*, 209 U.S. 123 (1908).[28]

This Court's decisions in *Seminole* and *Coeur d'Alene*, *supra*, "mark a significant narrowing of the scope of the *Ex parte Young* doctrine" that render it inapplicable to the current situation. This is true even assuming, *arguendo*, that

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refusal to waive is the exclusion of the State from otherwise lawful activity."527 U.S. at 687.

28 In *Ex parte Young*, a federal court enjoined a State official from bringing suit to enforce a State statute that allegedly violated the due process clause of the 14th Amendment. The Court held that when a State officer violates federal constitutional provisions, that officer has in effect been stripped of State authority - because the State could not be presumed to condone or authorize action that violates federal law - and can thus be sued as an individual.

State enforcement actions can be properly characterized as "determinations" under § 252 of the Act. Specifically, in *Seminole*, the Supreme Court held that the *Ex parte Young* exception to 11th Amendment immunity does not apply where "Congress has prescribed a detailed remedial scheme for enforcement against a State of a statutorily created right" 517 U.S. at 74. In *Seminole*, a State government's alleged failure to negotiate compacts allowing gaming on Indian reservations could not result in court injunctions pursuant to *Ex parte Young* because Congress prescribed a detailed remedial scheme in the *Indian Gaming Regulatory Act* (IGRA). *Id.* The IGRA provided for tribe-State negotiations in good faith, with a requirement that a pact be concluded in 60 days; if a pact was not concluded the parties would select a mediator who picked one compact; if the State then failed to adopt it, the Secretary of the Interior could then establish gaming regulations. *Id.* 517 U.S. at 72-74; 25 U.S.C. § 2710(d)(7)(B). Because Congress constructed a remedial scheme, this Court found no basis for concluding that Congress also intended individual State officials to be subject to federal suits. *Id.*, 517 U.S. at 74 n. 17.

Like the IGRA, the 1996 Telecommunications Act provides detailed provisions for compulsory arbitration of interconnection agreements, consisting of: (1) a 135-day initial negotiation between the incumbent local exchange carrier (LEC) and the competitive LEC, 47 U.S.C. § 252(b)(1); (2) a period of 135 days to 160 days in which a State commission may be petitioned for arbitration, 47 U.S.C. § 252(b)(4); (3) a 25-day period for responses to the petition, 47 U.S.C. § 252(b)(3); (4) a State commission decision within nine months of the initial request for

arbitration, 47 U.S.C. § 252(b)(4); (5) filing of an agreement with the State commission, which will then act between 30 and 90 days, depending upon the type of agreement, 47 U.S.C. § 252(e)(4); and, finally, (6) a judicial review of the State commission action. 47 U.S.C. § 252(e)(6). Accordingly, the *Seminole* result should also apply in this instance.

Also, the 1996 Act contains no other evidence that Congress intended to subject individual State officials to federal suits. In *Seminole*, this Court observed that the statute indicated that Congress clearly contemplated that the State would be the respondent and repeatedly referred to "the State." *Seminole*, 517 U.S. at 75. According to that decision, where a statutory scheme unmistakably "permits" a State or its agency to act, as opposed to an individual State official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Id.* 75 n.17. Thus, the *Seminole* Court determined that absent explicit Congressional authorization, Courts should not permit the use of an *Ex parte Young* action to negate a State's sovereign immunity.

In the 1996 Act, all of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and none of the provisions refer to individual State commissioners. Section 252(e)(6), the statutory provision that is central to this appeal, is entitled "Review of State Commission Actions." That heading alone implies any appeal will be filed against State Commissions – not individual commissioners. Section 252 refers forty-five times to the "State commission" with four such references contained in the subsection headings. See 47 U.S.C. §§252(b)(4)(e),

(e)(6), and (f)(2). It never refers to individual State commissioners.[29] Just as the Supreme Court decided that the remedial scheme of the IGRA precluded application of *Ex parte Young*, so too the remedial scheme of the 1996 Act, and the multiple references to State commissions, shows that Congress did not intend to apply the *Ex parte Young* doctrine to allow suit against officials of State commissions implementing the 1996 Act.

Coeur d'Alene, supra, provides a final rationale for this Court to reject application of *Ex parte Young* to the current circumstance. *Coeur d'Alene* held that the subject Indian tribe could not invoke the *Ex parte Young* exception to 11th Amendment immunity to sue individual Idaho State officials over title to certain submerged lands in the State. 517 U.S. at 287- 288. The Supreme Court held that Idaho's special sovereignty interest in the land and navigable waters within its borders required the 11th Amendment bar

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29 Suits brought under 252(e)(6) are clearly against the State as a sovereign entity. As discussed *supra*, the Act designates actions of the "State commission" as the object of federal review, not individual officials. Moreover, many State commissioners are only authorized to act as a collective entity. See, e.g., Section 350.01(5), Fla. Stat. What is challenged in such suits is the sovereign interest of the States to implement competition in the communications market pursuant to their police power with respect to the enforcement proceedings at issue. Plaintiffs have resorted to naming individual commissioners as defendants in these suits solely to invoke *Ex parte Young*. As such, they attempt to sacrifice state sovereignty to the "elementary mechanics of captions and pleadings" and "adhere to an empty formalism and .. . undermine the principle . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Coeur d'Alene* 521 U. S. at 270.

injunctions against individual Idaho officials seeking prospective injunctive relief over legal title to State land. Id. at 2040-2041. The Court emphasized that it was vital that Idaho be able to exercise its sovereignty to protect the public right to use navigable waterways. Id. at 2041-2042.

Likewise, the Illinois commission and NARUC's other member States have a special sovereignty interest in ensuring that their public rights of way are used by utilities to provide safe, reliable and reasonably priced local telephone service. Just as the State of Idaho has a sovereign interest in preserving public access to its navigable waters that prevented a suit against Idaho officials under *Ex parte Young*, so too do the States have a special interest in requiring telephone companies to open access to their networks in public rights of way to competitors to ensure the public's interest in receiving the best possible telephone service at the lowest price. This sovereign interest is particularly keen as the States labor to ensure that their citizens reap the maximum benefit of new communications technologies, such as the Internet, that are revolutionizing telephone service. *Coeur d'Alene* prevents this Court from discarding this special sovereignty interest by invoking *Ex parte Young* to allow suits against individual State utility commissioners. 521 U.S. at 287-288 [30]

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30 In *Coeur d'Alene*, Justices Kennedy and Rehnquist emphasized that the courts of Idaho would answer the Tribe's claim to State lands and waters. *Id.* at 270-272, 274-276, 287-288. If phone companies lack the remedy of a private suit against a State in federal court, that is solely the result of Congress' decision to preclude private suits against State commissions in State court. 47 U.S.C. § 252(e)(4). Given that §

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CONCLUSION

For the reasons set forth, *supra*, NARUC urges the Court to reject arguments to first find the Illinois Commerce Commissions enforcement action was a "determination" within the meaning of § 252, and/or that any of the three exemptions to State immunity from nonconsensual suit in federal courts applies.

The Court should find Illinois' sovereign immunity remains intact - having been neither abrogated nor waived, nor bypassed pursuant to *Ex parte Young*- and vacate the decision below.

252(e)(6) violates the 11th Amendment, perhaps § 252(e)(4), which is part and parcel of the same judicial review provision, should fall as well.

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